

Docket No. J&J5072USNP

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicants : J.F. Poccia III et al.
Serial No. : 10/656,428 Art Unit: 3761
Filed : September 5, 2003 Examiner: Chapman, Ginger
For : **ABSORBENT ARTICLE**

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APPEAL BRIEF

This is an appeal from the final rejection of the Examiner dated April 11, 2006, rejecting claims 1-10 and 13, of the pending application. This Brief is accompanied by the requisite fee set forth in 37 C.F.R. Section 1.17 (f). Applicants also are filing herewith a petition for a two-month extension of time and fee under 37 C.F.R. Section 1.136(a)(2). With the petition for a two-month extension of time, Applicants respectfully submit that the Appeal Brief is timely filed.

i. Real Party in Interest

Johnson & Johnson Consumer Companies, Inc., a New Jersey corporation, is the real party in interest.

ii. Related Appeals and Interferences

None

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iii. Status of Claims

Claims 1-13 are pending in the application. Claims 14-18 of the application have been cancelled. Claims 1-10 and 13 were finally rejected in an Office Action mailed on April 11, 2006 and this Appeal is taken with respect to these claims. Claims 11 and 12 have been withdrawn from consideration pending outcome of this Appeal.

iv. Status of Amendments

The application was filed on September 5, 2003 with 18 claims, two of which were independent.

The application was subject to a restriction requirement in the Office Action mailed October 6, 2005. Claims 11, 12 and 14-18 were withdrawn from consideration and claims 1-10 and 13 were rejected in the same Office Action.

Applicants filed an Amendment in response to the Office Action on February 2, 2006, traversing the rejection, amending claim 1 and canceling claims 14-18.

The Amendment was finally rejected in the Office Action mailed on April 11, 2006.

Applicants responded to the Office Action on June 30, 2006, at which time a Notice of Appeal also was filed.

v. Summary of the Claimed Subject Matter

Applicants are claiming an absorbent article comprising an absorbent fabric which comprises fibers and has a density from about 0.01 g/cc to 0.05 g/cc (Page 3, ll. 5-7, Page 12, ll. 17-20, Page 13, ll. 21-24, and Page 15, ll. 27-28). The nonwoven fabric has a first major surface and a second major surface (Page 16, ll. 4-9, Page 23, ll. 21-24); and an apertured film (Page 3, ll. 23 – Page 8, ll. 4, Page 21, ll. 16-20, Page 22, ll. 13-14, Page 23, ll. 2) secured to at least one major surface of the nonwoven fabric (Page 10, ll. 4 – Page 11, ll. 25, Page 12, ll. 16-17, Page 14, ll. 11-13). Absorbent articles of the invention are useful as components of various absorbent products including, but not limited to, sanitary protection products, disposable diapers and adhesive bandages (Page 20, ll. 16-Page 30, ll. 2).

vi. Grounds of Rejection to be Reviewed on Appeal

1. Claims 1, 3, 4, 6, 9, 10 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Pike et al (US 6,352,948).

2. Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pike in view of Utz (EP 0,403,187 A1).

3. Claims 5, and 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pike in view of Radel et al (4,342,314).

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vii. Grouping of the Claims

As to the rejections applied against claims 1-10 and 13, Applicants respectfully submit that claims 1-10 and 13 stand or fall together.

viii. Arguments

Claims 1, 3, 4, 6, 9, 10 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Pike et al (US 6,352,948). Applicants respectfully traverse.

A determination of anticipation under 35 U.S.C. 102 requires a finding that each and every limitation is found either expressly or inherently in a *single prior art reference*. *PIN/NIP, Inc. v. Platte Chemical Co.*, 304 F.2d 1235, 1243, 64 USPQ2d 1344 (Fed. Cir. 2002). A single prior art reference anticipates a claim if it expressly or inherently describes each and every limitation set forth in a claim. *Trintec Industries, Inc. v. Top-U.S.A. Corp.*, 295 F.3d 1292, 1295, 63 USPQ2d 1597 (Fed. Cir. 2002).

Pike discloses a multilayer laminate comprising a fine fiber nonwoven composite web which is a mixture of first and second groups of fibers, each of which is incompatible or immiscible with the other. The web is bonded to a barrier layer such a microporous film or nonwoven web of meltblown fibers (Abstract and Col. 2, ll. 11-21). Pike discusses average fiber cross-sectional area, average fiber diameter, fiber denier and fabric basis weight (Col. 6, ll. 27-40). Applicants respectfully submit, however, that nowhere in Pike is the density of an absorbent article disclosed or otherwise discussed. As such, Applicants respectfully submit that Pike fails to expressly disclose the claimed density range of Applicants' articles.

Applicants further submit that the fabrics disclosed in Pike would not inherently have a density between about 0.01 and 0.05 g/cc. As noted at page 12, ll. 16-22 of Applicants' specification, fabric density will vary depending on the type and denier of the fiber, in addition to the thickness and basis weight of the fabric. As to denier, Pike discloses fiber denier less than about 1.0, desirably from about 0.025 to 0.9, and more preferably from 0.1 to 0.5. Pike discloses a basis weight between 5 g/m² to 340 g/m². A key, if not necessary, factor in determining density of nonwoven fabrics is the thickness of the fabric. The actual thickness measurement is dependent on what particular method is used to determine the thickness. As noted in Applicants specification, in order to determine the thickness using methods employed by Applicants, the pressure applied to the fabric must be ascertained (Page 26, ll. 13-23). Yet, Applicants respectfully submit that Pike is silent as to any method of measuring thickness or the thickness of fabrics contemplated by Pike. In view of the variables related to density of a fabric, the fiber denier disclosed in Pike, the broad range in basis weight of Pike and the lack of any discussion regarding thickness or methods of measuring thickness, Applicants respectfully submit that fabrics contemplated by Pike would not inherently possess densities between about 0.01 and 0.05g/cc.

Applicants note that US Patent No. 3,849, 241, issued to Butin et al, while not applied as a reference in the rejection of claims under 35 U.S.C. 102(b), apparently is relied upon as a secondary reference to supplement Pike with regards to density of nonwoven fabrics. Applicants respectfully submit that 35 U.S.C. 102(b) requires that each and every limitation be found either expressly or inherently in a "single" prior art reference. Applicants respectfully submit that the use of Butin to supplement Pike is further evidence that Pike fails to expressly or inherently disclose Applicants' claimed invention.

As Pike neither expressly or inherently discloses fabrics having densities between about 0.01 and 0.05 g/cc, Applicants respectfully submit that claims 1, 3, 4, 6, 9, 10 and 13 are patentable over Pike under 35 U.S.C. 102(b).

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pike in view of Utz (EP 0,043,187 A1). Applicants respectfully traverse.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference or references must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d, 1438 (Fed. Cir. 1991) and MPEP 2142 and 2143.

Initially, Applicants reiterate the arguments made in response to the 102(b) rejections with respect to Pike and respectfully submit that Pike fails to disclose, either expressly or inherently, fabrics having densities between about 0.01 and 0.05 g/cc. Applicants further respectfully submit that Pike fails to provide the requisite teaching or suggestion that would motivate one skilled in the art to modify Pike so as to select densities as claimed by Applicants. For example, Pike is silent as to specific fabric density ranges, or to methods of measuring thickness of nonwoven fabrics discussed therein. In addition, Pike is silent as to any method of determining density of nonwoven fabrics discussed therein. Applicants respectfully submit that without such disclosure as to a method of measuring the thickness, or a suggestion as to a range of thickness, or a suggestion as to what method should be used to determine density, one skilled in the art would not be motivated to modify Pike with a reasonable expectation of success as to absorbent articles as claimed by Applicants. Rather, Applicants submit that Pike teaches away from such articles comprising fabrics having such relatively lower densities. Applicants respectfully submit that the standard for establishing *prima facie* obviousness is obvious to do, not obvious to try. Applicants respectfully submit that to modify Pike as suggested would require hindsight selection based on Applicants' specification.

Utz discloses flexible composites comprising perforated plastic films bonded to a fibrous layer (Abstract). While Utz does discuss polymers that may be employed to fabricate fibers, in general (Col. 2, ll 15-28), Applicants respectfully submit that Utz does not cure the

deficiencies of Pike with respect to fabric density. Thus, Applicants respectfully submit that the combination of Pike and Utz does not render claim 2 obvious. Accordingly, Applicants respectfully submit that claim 2 is patentable under 35 U.S.C. 103(a) over Pike in view of Utz.

Claim 5, 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pike in view of Radel (4,342, 314). Applicants respectfully traverse.

Initially, Applicants reiterate the arguments made in response to the 102(b) and 103(a) rejection of claims 1-4, 6, 9, 10 and 13, respectively, in regards to Pike and respectfully submit that Pike fails to disclose, either expressly or inherently, or teach or suggest, and furthermore teaches away from fabrics having densities between 0.01 and 0.05 g/cc. Radel discloses plastic webs exhibiting a fiber-like appearance (Abstract). The webs are said to be useful in, e.g. absorbent structures such as bandages, diapers and catamenial appliances (Col. 4, ll 57-63). However, Applicants respectfully submit that the use of Radel fails to cure the deficiencies of Pike with respect to fabric density. Thus, Applicants respectfully submit that the combination of Pike and Radel fails to render obvious claims 5, 7, or 8. Accordingly, Applicants respectfully submit that claims 5, 7 and 8 are patentable under 35 U.S.C. 103(a) over Pike in view of Radel.

Based on all of the foregoing, Applicants respectfully request that the application be remanded with instructions to withdraw rejections of claims 1-10 and 13 under 35 U.S.C. 102(b) and 103(a). Applicants further respectfully request that, should claims 1-10 and 13 be found patentable, claims 11 and 12 be considered on the merits upon remand.

Respectfully submitted,

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ix. Appendix of Pending Claims

Claim 1. (Previously Presented) An absorbent article comprising:

an absorbent fabric comprising fibers and having a density from about 0.01 g/cc to 0.05 g/cc, said nonwoven fabric having a first major surface and a second major surface; and an apertured film secured to at least one major surface of the nonwoven fabric.

Claim 2. (Original) The article of claim 1 wherein the fibers comprising the nonwoven fabric are selected from the group consisting of rayon, cotton, wood pulp, and combination thereof.

Claim 3. (Original) The article of claim 1 wherein the fibers comprising the nonwoven fabric are bicomponent fibers.

Claim 4. (Original) The article of claim 1 wherein the nonwoven fabric comprises a blend of from about 70% to about 90% by weight of synthetic non-absorbent fibers and from about 5% to about 30% by weight of absorbent fibers and has a basis weight ranging from about 30 gsm to about 10 gsm.

Claim 5. (Original) The article of claim 1 wherein the apertured film comprises a polymeric material selected from the group consisting of ethylene methyl acrylate, polyethylene, metallocene catalyzed polyethylene, polypropylene, and copolymers thereof, and ethylene vinyl acetate copolymers.

Claim 6. (Original) The article of claim 1 wherein the article is a wound contacting pad for an adhesive bandage.

Claim 7. (Original) The article of claim 6 wherein the open area of the apertured film ranges from about 5 percent to about 30 percent of the total area of the apertured film.

Claim 8. (Original) The article of claim 7 wherein the open area of the apertured film ranges from about 10 percent to about 25 percent of the total area of the apertured film.

Claim 9. (Original) The article of claim 1 further comprising a top layer secured to the second major surface of said nonwoven fabric.

Claim 10. (Original) The article of claim 9 wherein said top layer material is a microporous film.

11. (Withdrawn) The article of claim 10 wherein the article is a disposable diaper.

Claim 12. (Withdrawn) The article of claim 10 wherein the article is a sanitary protection pad.

Claim 13. (Original) The article of claim 10 wherein the article is an adhesive bandage.

Claim 14-18 (Cancelled)